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Utah Supreme Court

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Recommended Citation

Reply Brief, *Pender v. Jackson*, No. 7896 (Utah Supreme Court, 1953).
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In the Supreme Court of the State of Utah

RENNOLD PENDER,

Plaintiff and Appellant,

vs.

T. C. JACKSON and RUBY G. JACKSON,
his wife, CHARLES E. DAVEY, and
JANE DOE DAVEY, whose true name
is unknown, RALPH M. DAVEY, and
BETH S. DAVEY, his wife, et al.,

Defendants and Respondents.

Case No. 7,896

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE WILL L. HOYT, *Judge*

FILED

JAN 10 1953

MILTON V. BACKMAN of
BACKMAN, BACKMAN & CLARK
and

Clerk, Supreme Court,

R. S. JOHNSON

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and Appellant.*

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CASE No. 7,896

APPELLANT'S REPLY BRIEF

The nature of respondents' arguments and the desire to inform the Court of other pertinent and relevant matters in relation thereto, impel the submission of this reply brief by appellant.

STATEMENT OF POINTS ARGUED

The argument in this reply brief will be directed towards refutation of the respondents' seven points, under the headings:

POINT I

ACTUAL KNOWLEDGE OF ADVERSE HOLDING IS EQUIVALENT TO OPEN, NOTORIOUS, AND HOSTILE POSSESSION OF LAND.

POINT II

APPELLANT DID TAKE POSSESSION OF THE GROUND, AND AS OCCUPANT USE IT FOR INVESTMENT, ETC., ADVERSELY.

POINT III

APPELLANT'S ACTS OF POSSESSION WERE MORE THAN CASUAL, OCCASIONAL TRESPASSES—ACTUALLY ADVERSE POSSESSION.

POINT IV

DOCTRINE OF DAY VS. STEELE DOES NOT PRECLUDE RECOVERY HERE BY APPELLANT—INAPPLICABILITY.

POINT V

APPELLANT DID OCCUPY THE LAND CONTINUOUSLY, HOSTILELY, EXCLUSIVELY, OPENLY, AND NOTORIOUSLY.

POINT VI

TELONIS VS. STALEY DOCTRINE SHOULD STILL BE ABROGATED.

POINT VII

ALLEGED WRONGFUL ASSESSMENT OF NO AVAIL TO RESPONDENT.

ARGUMENT

POINT I

ACTUAL KNOWLEDGE OF ADVERSE HOLDING IS EQUIVALENT TO OPEN, NOTORIOUS, AND HOSTILE POSSESSION OF LAND.

Since respondents' initial point for argument [i.e. necessity for possession that is continuous, hostile, open, notorious, and exclusive—Page 2, Respondents' Brief] contains a comprehensive list of subjects which are elsewhere more fully discussed in their brief, it is deemed best to make rebuttal argument on most of them under the later headings where they are more fully set out, rather than under a heading which is supported solely by a single brief quotation of law as in their brief.

Respondents assume that *IN ALL CASES*, the notoriety, openness, and hostile character of appellant's possession must *AS SUCH* be shown and proven. This is not *ALL* the law, and without in anywise admitting that there was any lack of such notoriety, openness or hostility in appellant's occupation of the ground in question,—all of which appears more fully at pages 6 through 13 of Appellant's Brief heretofore submitted, we feel it incumbent to bring to the Court's attention the fact that notoriety, openness, and the hostile or adverse character of the claimant, are not always required to be shown as respondents assume, for, although:

“It is essential to the acquisition of title by adverse possession that the true owner shall have knowledge or notice, actual or constructive, that the possession is hostile or adverse.” [Section 45, Adverse Possession, 2 Corpus Juris Secundum, page 558]

yet such notice may arise or be deemed given by either of two methods:

“The true owner must have actual knowledge of the hostile claim,

OR

the possession must be so open, visible, and notorious as to raise a presumption to, or knowledge by him of the adverse claim”. [Section 45, Adverse Possession, 2 Corpus Juris Secundum, page 558].

Certainly, in this case, in addition to the character of appellant's use, occupation, and possession of the ground in question, it appears that this adverse claim of right was *PERSONALLY* known and communicated to respondents. Respondents Davey were aware of the

issuance of the tax deed, and, appellant offered to sell his adverse claims and interest to Davey [Rec. 82, 87, 91], and appellant here, as early as 1941 [Rec. 42, 97] asserted his adverse claim by filing an action to quiet title against respondents.

Respondent having the certainty of actual knowledge of appellant's adverse claim to the ground, is bound by the rule that:

“The owner's actual knowledge of the adverse possession is equivalent to, and dispenses with the necessity of, open and notorious possession.” [Section 45, Adverse Possession, 2 Corpus Secundum, page 559].

“ that is, he [adverse claimant] must show actual knowledge of the real owner that he claims in opposition to, and in defiance of his title, or he must show such occupancy and user, so open, notorious, and inconsistent with as well as injurious to the rights of the true owner, that the law will authorize from such facts the presumption of such knowledge by the true owner. *Heckesher v. Cooper*, 203 Mo. 278, 293, 101 S. W. 658, 662, quoting from *Hennewell vs. Bushott*, 152 Mo. 611, 54 S. W. 487.” — *Burnside vs. Doolittle*, 24 S. W. 2nd 1011, 324 Mo. 722.

POINT II

APPELLANT DID TAKE POSSESSION OF THE GROUND, AND AS OCCUPANT USE IT FOR INVESTMENT, ETC., ADVERSELY.

Respondents' second point is directed to the thought that appellant “never took possession”. They endeavor to make it appear that appellant never took possession of the ground and assert that it is controverted that

appellant went upon the ground. Respondents do not show any reference to facts in the record to disprove that appellant actually went upon the ground [Rec. 17-19, 45-52] and thereby took possession—but only argue the statutory effect, from their viewpoint, of the presumptions they deduce from our statutes.

However, respondents again omit the complete picture of the law, by failing to note that, even in the case of a void deed, that the following rule requiring initially an entry is all that is required at that time, as is indicated:

“ A void deed doesn't operate to give the grantee constructive possession of the land where it is not shown to have been followed by an actual entry, it cannot serve to give adverse possession.” — [Section 129 — Possession Under an Invalid Tax Deed, 1 American Jurisprudence, Page 865].

Appellant's tax deed was prima facie valid and unassailed all through the years 1939 to 1951, but, assuming even to the contrary, which is not conceded, still, under the principle above enumerated, it cannot be said that appellant did not go upon the land, making his entry, and establish his possession [Rec. 17-19, 45-52], as so definitely asserted by respondents, and, there is no CONTRARY EVIDENCE to controvert the actual physical fact of his going and setting foot on the ground.

Respondents' counsel in further argument under this second point makes the very misconstruction of Section 104-2-7, U.C.A., 1943, or 104-12-7, Ch. 58, Session Laws of Utah, 1951, against which they were warned by

appellant's discussion under his point "(E)", entitled "Presumptions" as set forth at page 13 of his brief, in assuming that the statute in question reads as " the person establishing *THE* legal title to such property shall be presumed to have been possessed, etc. " whereas in fact the statute reads: " the person establishing *A* legal title to such property, shall be presumed to have been possessed, etc. ", and assumes to claim for themselves the benefits of the presumption given by such statute, whereas actually, the presumption is operative only after the determination of whether "A" legal title exists in appellant or respondent, or both—in other words it is a case of putting the cart before the horse, to claim the benefit of the presumption before the determination of title is made.

Respondents' counsel very blandly claims, without citing any authority therefor, that appellant's construction of the phrase, "the ordinary use of the occupant" [Appellant's Brief, pages 8-11], is the purpose, rather than the use, made of the land, and, just dismisses any further consideration of the matter from his mind—and tries to lead the discussion away from that point by ignoring it, since he cannot refute it!!

Purpose is defined as: "That which one sets before himself as an object to be obtained, the end or aim to be kept in view in any plan measuring exertion or operation." [Webster's New International Dictionary, 2nd Edition].

Use is defined as: (Law) That enjoyment of property which consists in its employment, occupation, exercise or practise". [Webster's New International Dictionary, 2nd Edition].

Webster defines “to use” among other definitions as “to make use of”, “to convert to one’s service”, “to avail oneself of”, “to put to a purpose”. [43 Words & Phrases, Permanent Edition, page 475].

“The word ‘use’ is synonymous with employment. Common meaning of use is to employ for accomplishment of a purpose, turn to account.” [43 Words & Phrases, Permanent Edition, page 478].

Now all that is required by Section 104-2-9, Utah Code Annotated 1943, or Section 104-12-9, Chapter 58, Laws 1951, Pages 182-3, is that land be put to the “ORDINARY USE OF THE OCCUPANT”. It certainly appears that the occupant has his choice of uses—merely because he chooses differently than respondent or respondents’ counsel would choose.— does not deprive him of the benefits of the statute.

Investment can be just as much of an employment or use, or turning to account, or accomplishment of an end as any other use or usage of ground.

Century Dictionary defines the word invest as follows: “To employ for some profitable use. . . .” [22 Words & Phrases, Permanent Edition,, Pages 529-30].

The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood.” [22 Words & Phrases, Permanent Edition, Page 536].

The word “invest” means to convert into some other form of wealth, usually of a more or less permanent value, to employ for some profit-

able use, to plan so that it will be safe and yield a profit, [22 Words & Phrases, Permanent Edition, page 536].

The conclusion is inescapable that the appellant employed this property for his ordinary use, and that such use continued for more than seven years, with a consequent barring of respondents' rights—if any they had—in this ground.

POINT III

APPELLANT'S ACTS OF POSSESSION WERE MORE THAN CASUAL, OCCASIONAL TRESPASSES—ACTUALLY ADVERSE POSSESSION.

Respondents' third point of argument is directed to attacking appellant's possession as casual and occasional and without basis for adverse possession.

There is no evidence in the record to show appellant originally entered or occupied the land as a tenant of respondent, or had any former possession of the land by reason of dealings with respondents. Appellants claimed under a tax deed—a wholly independent source of title—a claim which was manifested to respondents from the beginning, and brought home to them immediately, on the purchase from the county, and again when an action to quiet title was instituted against them in 1941. Respondents cannot plead ignorance of appellant's adverse claims.

Appellant took possession—he became an occupant by putting up signs and giving notice to all and sundry of his claimed proprietorship of the land, he held it for a proper use, continuous and undisturbed, and

went upon the land from time to time to see that his signs and occupancy were unopposed, he complained to the school authorities and had the school land fenced off from his land when school children strayed off the playgrounds onto appellant's ground; he had the ground plowed—he never saw the respondent there—he never had any interference with his originally established possession and the purpose for which he was holding the ground. Having once established himself as the occupant he continued to hold the possession, with a definite usage permitted him by law—no one ever tried to put him off or barred his occupancy.

POINT IV

DOCTRINE OF DAY VS. STEELE DOES NOT PRECLUDE RECOVERY HERE BY APPELLANT—INAPPLICABILITY.

Respondents' fourth point relies upon the situation of *Day vs. Steele*, 111 Utah 481, 184 Pac. 2nd 216 to attempt to preclude appellant's recovery in this cause.

The gist of respondents' contention is that comparison of the facts of adverse possession as contended by him with respect to this case, make such a parallel with the situation in the *Day vs. Steele* Case as to bring it within the application of the principles there set forth. Respondents err, however, in overlooking the point that many of the various acts of the appellant in this case are used only for the purpose of establishing his occupancy of the ground, rather than his whole case of adverse possession, and, appellant, under our theory, having established himself as occupant, is then at liberty to rely on his ordinary usage for investment,

etc., as such occupant to divest title from respondents by adverse possession, as shown in point “(C)” entitled Ordinary Use of the Occupant, pages 8-11, Appellant’s Brief.

Respondents (Page 9-10 their brief) quote at great length from the case of *D. H. Peery Estate vs. Ford*, 46 Utah 436, 151 P. 59, at page 65, to further bolster their contentions anent adverse possession, but again overlook the essential difference basic to the Peery case and the instant situation, which makes that alleged authority totally inapplicable here. There is here involved the matter of adverse possession under a written instrument, while in the Peery Case, the dispute was over a parcel of surplus or excess ground, not originally within the deeded areas of either of the contesting parties, and it did not appear from the actions detailed, that defendant’s use was so equivocal as to make it an absolutely adverse usage. Such language from the quoted excerpt is therefore applicable to a wholly different situation than existed here.

POINT V

APPELLANT DID OCCUPY THE LAND CONTINUOUSLY, HOSTILELY, EXCLUSIVELY, OPENLY, AND NOTORIOUSLY.

Respondents’ fifth point, comprising the same items as his first point, makes claim that there was no continuously hostile, open, notorious, and exclusive possession by appellant.

Respondents assume that appellant’s visits were limited to one per year, and that there was something

clandestine, or stealthy in making the same; whereas the truth of the matter is otherwise than the slurring inferences drawn by respondents. Appellant's visits were *at least* once a year, and *at times oftener* [Rec. 17-19, 45-52], and it does *not* appear that he went at night, by the light of a candle, or something of that sort, or at other out of the way times, but that he went openly, and at times with a witness [Rec. 56]. Certainly such course of action was open and above board. As previously set out, respondents were aware of appellant's adverse claims by direct notification—and open, notorious possession was not needful to advise them of the appellant's adverse and hostile claims to the property—but, even so, as respondent Davey testified, he himself found on the ground, appellant's "for rent" sign to inform him of appellant's claim to the ground as owner-landlord!! And the court may judge from a comparison of exhibits "G" and "H", just how little appellant's signs were as stated by the respondents!! They weren't as microscopic as respondents would have us believe!!

POINT VI

TELONIS VS. STALEY DOCTRINE SHOULD STILL BE ABROGATED.

Respondents' sixth point, discussing appellant's argument for abrogating the continuance of the Rule of Telonis vs. Staley, *saliently* ignores the principle contention of appellant, and then goes on to misstate the fact that the *only* ground for departure from the rule and venturing into the realms of conjecture revolves around a cited California decision. Perhaps it is good

tactics to ignore an argument that cannot well be refuted or readily answered, but, by so doing the implication of acquiescence arises.

The language of our Supreme Court on page 517 of 144 Pacific 2nd (*Telonis vs. Staley*, 104 Utah 537) makes it clear that lack of curative statutes relating to the lack of the auditor's certificate was a prime reason for holding it an essential step in the tax procedure, and invalidating tax deeds based on proceedings where it was lacking—but, now, due to the fact that the enactment of Sections 104-2-5 to 104-2.5-11, Chapter 19, Session Laws of Utah, 1951, that general rather than specific curative acts are on the books in an attempt to cure all and not just some tax procedural flaws—the old reason for holding the affidavits essential no longer exists. Since the reason for the rule has gone by the board, the reason for holding to the doctrine of *Telonis vs. Staley* should no longer be held applicable to avoid tax sales.

Further, when our Court has cited the California view applicable to a situation, as it did in construing similar Utah statutes to those of California, in *Telonis vs. Staley*, supra, it is in order to show the illogical situation resulting from not applying the same strictness of the rule in a case like *Steele vs. San Luis Obispo*, 152 California 785, 93 Pacific 1020, as a basis for showing how continued further application of the principle would result in an untoward holding, and, there is no venturing into conjectural fields, since the logic of the situation is that if the line of reasoning of the California courts is followed in one instance, the same re-

sults as they have achieved in other situations might follow here, too.

POINT VII

ALLEGED WRONGFUL ASSESSMENT OF NO AVAIL TO RESPONDENT.

Respondents' seventh point, is a last ditch, desperate effort, to save their case, should the ruling of this Honorable Court, as it should be, be adverse to their contentions. In the first place, it is to be noted that the basis of such error is alleged to be supported by respondents' quoted extract from *Tintic Undine Mining Company vs. Ercanbrack*, 74 Pacific 2nd, 1184, 93 Utah 561, which was by the very words of that case limited:

“ . . . By what is here said we do not hold that in *every* case *any one* of the irregularities appearing in this record and set forth and enumerated as (a) to (k) inclusive renders a tax sale void. . . . ” [1189, 74 Pac. 2nd].

Further, respondents overlook the fact that irrespective of whether their claimed error in this last point is sustained or not, that if appellant's contentions with respect to adverse possession are sustained, as they ought to be, that that purported defect, even if dignified as such, is still of no avail to respondents since appellant's title by adverse possession, even if the tax deed were defective on this last item, would still overcome the effect of such.

For these reasons, and those set forth in appellant's original brief in this cause, it is therefore respectfully

urged that the holding and decree of the trial court be reversed in conformity with appellant's contentions as expressed on this appeal.

Respectfully submitted,

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